

Kate Brown
Governor



OFFICE OF THE GOVERNOR

MEMORANDUM

CONFIDENTIAL & PRIVILEGED

ATTORNEY-CLIENT COMMUNICATION

Date: May 2, 2019

To: Governor Brown
CC: Nik Blosser

From: Emily Matasar, Government Accountability Attorney

Re: Meeting with Public Records Advocate Ginger McCall on May 9, 2019

BACKGROUND:

Public Records Advocate Ginger McCall is coming to meet with you to check in on the work of the Office of the Public Records Advocate and the Public Records Advisory Council (“Council” or “the PRAC”) over the past year. The conversation will be guided by the First Biennial Report of the Public Records Advisory Council (“the Report”), which was submitted to you and the Legislative Assembly in November of last year.

PRAC REPORT:

The PRAC and the Office of the Public Records Advocate were created by Senate Bill 106 in 2017. Once the PRAC was appointed and convened in October 2017, its first task was to nominate three candidates to you for appointment to the position of the Public Records Advocate. From that pool, you appointed Ginger McCall in December 2017, her appointment was confirmed by the Senate in February 2018, and she began setting up the Office of the Public Records Advocate in earnest in late April 2018. In order to ensure some independence, Senate Bill 106 established that the State Archivist may furnish office facilities and provide administrative support to the Public Records Advocate, and if she declines,

then DAS shall. The State Archivist exercised its discretion to provide such support to the Office of the Public Records Advocate, which is therefore housed at State Archives.

In her first year in Office, Ginger has overseen the creation of an entirely new and novel office within state government, assumed the duties of the Chair of the PRAC, and hired a deputy, Todd Albert. She has trained or overseen the training of nearly 1,500 public employees and members of the public in 40 trainings throughout the state, provided assistance in over 150 instances to public records requesters and public employees involved in public records disputes, and forged strong, lasting relationships with government officials, the media, requester communities and interest groups. Under her direction, the PRAC launched the first-ever comprehensive survey of the public records practices of public bodies at all levels in the state. Ginger has also provided direct support to the Sunshine Committee by drafting an in-depth report meant to illuminate the issues around the committee's deliberations about personally identifiable information. Furthermore, Ginger launched the first-of-its-kind Sunshine Week initiative in Oregon to foster conversation around transparency and access to information held by the government, culminating in letters of recognition by the Governor to eleven public employees who went above and beyond on public records matters and a gallery of new stories made possible by public records.

The PRAC unanimously agreed to introduce two pieces of legislation in the 2019 legislative session. Both bills were drafted through the Secretary of State's office, and introduced by Representative Karin Power. The first, HB 2430, eliminates the sunset date of the PRAC, and cleans up the members' terms. HB 2430 passed the House with 59 votes and just passed the Senate without a single no vote. HB 2431 requires state agencies to track and report information about the number of public records requests received each year and the number of requests completed within 15 and 60 days. The Board of Parole and Post-Prison Supervision, Oregon Youth Authority, and Board of Pharmacy reported that there would be an indeterminate fiscal impact, and DHS estimated a fiscal impact of \$90,395 General Fund and \$90,095 Federal Funds for an Operations and Policy Analyst 3 (0.75 FTE) for the 2019-21 biennium, and \$118,773 General Fund and \$118,373 Federal Funds for this position (1.00 FTE) for the 2021-23 biennium. After the House Committee on Judiciary held a public hearing and work session, HB 2431 was referred to Ways and Means, where it remains.

The Report also includes the Advocate's observations on some "systemic issues" with Oregon's public records law relating to fees, elected officials' records, litigation, exemptions, delays, non-compliance, and lack of resources. Although the Report contains many interesting ideas about improving the public records law and its administration throughout the state, other ideas demonstrate a lack of a nuanced understanding of the public records landscape in Oregon. In addition, you have already implemented many of the Report's suggestions throughout state agencies, which generally perform significantly better than other public bodies such as cities, counties, and special districts.

For example, on January 26, 2016, you signed Executive Order No. 16-06 which ordered DAS to implement the recommendations in the Secretary of State's 2015 Audit on public records practices in

state agencies. The Public Records Requests and Management Project was formed to effect the EO, and over the course of two years, achieved the following outcomes:

- Developed a statewide public records management model policy, adopted by all executive branch agencies, and achieved 100% compliance by November 2016;¹
- Issued a Request for Information (RFI) regarding electronic records management and document management products in December 2016;
- Drafted a Statewide Standardized Fee-Structure, adopted by DAS as a statewide policy in February 2017. The Fee-Structure includes a standard fee schedule, a reduced fee schedule, a criteria for evaluating fee waiver requests, and guidance for agencies on communications with requesters regarding requests and fees; and
- Created the Roadmap for the Future of Public Records Management in Oregon, which includes strategies to 1) quantify and manage public records throughout the state; 2) improve responses to public records requests and track both requests and responses; and 3) use technologies to streamline all aspects of public record management and requests.

Although we have heard from journalists that the Statewide Fee-Structure does not go far enough to establish a presumption of fee reduction or total waiver for journalists, the Fee-Structure does, for example, require that state agencies waive the first 30 minutes of time spent on responding to every single request, a requirement that is lauded in the Report. The Report also recommends establishing a standard for determining whether to grant a fee waiver or reduction and a standard reduced rate or fee, both of which the Statewide Fee-Structure does. The only way to apply these fees and standards to all public bodies statewide and to empower the Attorney General to review fee reasonableness (another suggestion in the Report) would be through legislation.² Of course, the problem with legislating dollar amounts is inflation, which is why the law permits a “reasonable” fee that is tied to actual costs, but does not codify that fee.

One section in the Report relates to provisions in the public records law specific to elected officials. See Section III.2. It points out that “if a records request is denied by an elected official, the only option that the requester has is to take the matter to court[,]” which “creates a lack of accountability around the decisions of elected officials” due to the costly and time-consuming nature of a lawsuit. The Report fails to recognize, however, that the pre-court or intermediate review for other public bodies is performed by elected officials (the Attorney General for state agencies and local District Attorney for non-state agency public bodies). It would create a unique and awkward situation to require one elected official to review the actions of another elected official and potentially order that official to take action. The Report also fails to account for the most significant type of accountability for elected officials’ public records decisions: accountability to the public. The Report also discusses ORS 192.427, which “allows an elected official to claim the right to withhold disclosure of documents not only in their own custody, but also documents in the custody of another person.” Although this provision is often

¹ With the significant public records reforms passed during the 2017 session, these policies became out of compliance, but your Office partnered with DAS to get all policies updated and approved by the State Archivist, a process that is still ongoing.

² At the request of the Society of Professional Journalists, Representative Karin Power, ex-officio member of the PRAC, introduced HB 2345 to reduce public records fees charged by state agencies by 50 percent of the requester is a member of the news media, and to waive the fees entirely if that request is narrowly tailored. HB 2345 remains in House Rules, but has not been scheduled for a public hearing.

criticized because it “invites abuse”—a corrupt elected decides to shield all records from public view—in reality it is seldom used.³ Another recommendation suggests expanding the Public Records Advocate’s jurisdiction to include facilitating disputes between requesters and elected officials. The law does not prohibit such facilitated dispute resolution, and Ginger has helped requesters of records belonging to elected officials in the past, but the law as is does not require the elected official to come to the Advocate’s table in the same way it does for state agencies and cities.

Misha and Emily have already given Ginger the feedback that aspects of her report seem to lack context or nuance and that they would have appreciated a meaningful opportunity to comment on a draft of the report before finalization.

Here are some of the Report’s recommendations that you should consider supporting, all of which would require legislation:

- Expanding review of public body decisions to include reasonableness of fees;
- Allowing the Public Records Advocate to facilitate disputes between elected officials and requesters on public records disputes, mandating that the elected official participate in good faith;
- Preventing public bodies from suing requesters to appeal decisions made by the Attorney General or District Attorneys ordering disclosure of records;⁴ and
- Implementing reporting requirements for all public bodies subject to the public records law.

In addition, you can require all state agencies to include in their public records request responses the name and contact information of the official responsible for the decision regarding the request.

Finally, the Office of the Public Records Advocate requested two additional positions for the 2019-21 biennium, which you recommended be added to the DAS budget under the Office of the Chief Operating Officer program.

³ The Report does not cite a single instance of an elected official withholding records of another public body. The last time an elected official shielded state agency records was in 2014 when Governor Kitzhaber used ORS 192.427 to withhold Cover Oregon records, and a Google search did not reveal a single news story about elected officials withholding local government records.

⁴ Your Office partnered with Rep. Power to bring House Bill 3399 this session to make this change, but it never went up for a vote in the House Committee on Judiciary.